

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

|                                   |   |                       |
|-----------------------------------|---|-----------------------|
| CARMELO GRASSO,                   | ) |                       |
|                                   | ) |                       |
| Petitioner,                       | ) |                       |
|                                   | ) |                       |
| v.                                | ) | Docket No. 8571-13 L. |
|                                   | ) |                       |
| COMMISSIONER OF INTERNAL REVENUE, | ) |                       |
|                                   | ) |                       |
| Respondent                        | ) |                       |

**ORDER AND DECISION**

Pending before the Court is respondent's Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted And To Impose A Penalty Under I.R.C. Section 6673, filed June 5, 2013, and supplemented July 19, 2013.<sup>1</sup> Because respondent's motion, as supplemented, presents matters outside the pleadings, such motion, as supplemented, will be treated as one for summary judgment. Rule 40.<sup>2</sup>

Respondent's Appeals Office sent petitioner a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated March 29, 2013, regarding petitioner's section 6702 frivolous return penalty liabilities for the taxable years 2006, 2007, 2008, and 2009. Such notice sustained the proposed levy action in respect of those liabilities. Petitioner timely filed a petition with this Court. Thereafter, on June 5, 2013, respondent filed a Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted And To Impose A Penalty Under I.R.C. Section 6673. On June 25, 2013, petitioner filed an amended petition. Thereafter, on July 19, 2013, respondent filed a Supplement to his motion. Most recently, on July 29, 2013, petitioner filed an Objection to respondent's motion, as supplemented.

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<sup>1</sup> All subsequent section references are to the Internal Revenue Code of 1986, as amended.

<sup>2</sup> All Rule references are to the Tax Court Rules of Practice and Procedure.

**SERVED Aug 01 2013**

In his motion, as supplemented, respondent argues that the gist of the petition and the amended petition is petitioner's contention that purported zero returns petitioner submitted to respondent are not frivolous because compensation received by petitioner is not taxable income inasmuch as petitioner is a private sector employee employed by a private sector company and is not a Federal employee.

### Background

The record establishes and/or the parties do not dispute the following facts.

During 2006, 2007, 2008, and 2009, petitioner received a salary from his employer for each of those years. On Forms W-2, petitioner's employer reported to respondent the salary paid to petitioner for those years.

Petitioner submitted to respondent Forms 1040X, Amended U.S. Individual Income Tax Return, for 2006, 2007, and 2008 claiming refunds of withholdings that his employer made from petitioner's salary for those years. Petitioner also attached Forms 4852, Substitute For Form W-2, to those Forms 1040X. The Forms 1040X and Forms 4852 claimed that petitioner had zero taxable income for those years. Petitioner submitted to respondent a Form 1040, U.S. Individual Income Tax Return, for 2009, along with a Form 4852, claiming that petitioner had zero taxable income for that year.

Respondent determined that petitioner submitted frivolous returns for 2006, 2007, 2008, and 2009 and assessed frivolous return penalties for those years. Petitioner failed to pay the penalties.

On October 30, 2012, respondent mailed a so-called collection due process levy notice to petitioner with respect to the section 6702 penalties for 2006, 2007, 2008, and 2009. Petitioner timely submitted a Form 12153, Request For A Collection Due Process Hearing, in which he challenged the underlying liabilities. On February 5, 2013, a settlement officer of respondent's Office of Appeals sent petitioner a letter scheduling a telephonic conference. During the telephonic conference, petitioner asserted that no frivolous returns were filed and that petitioner received no taxable wages or other compensation because petitioner is a private sector employee employed by a private sector company and is not a Federal employee. Petitioner maintained that he did not owe the penalties, and he stated he did not want to pursue a collection alternative.

On March 29, 2013, respondent issued petitioner a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 sustaining the proposed levy action for the frivolous return penalties for 2006, 2007, 2008, and 2009. On April 18, 2013, petitioner filed a petition. On June 25, 2013, petitioner filed an amended petition; thereafter, on July 29, 2013, petitioner filed an Objection to respondent's pending motion, as supplemented. In his Objection, petitioner acknowledges that he is a "private sector worker" but contends, inter alia, that he does not derive income from his services, citing Eisner v. Macomber, 252 U.S. 189 (1920), because "[t]he sources listed in Section 61a [i.e., sec. 61(a)] of the IRC are not income." (We note that section 61(a) provides as the general definition of gross income all income from whatever source derived; among the items specifically included in the definition is compensation for services. Sec. 61(a)(1).)

### Discussion

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted with respect to all or any part of the legal issues in controversy "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Sections 6320 and 6330 provide procedures for administrative and judicial review of respondent's lien and levy actions. Section 6331(a) provides that if any person liable to pay any tax neglects or refuses to pay such tax within 10 days after notice and demand for payment, the Commissioner may collect such tax by levy on the person's property. Under section 6330, the Commissioner cannot proceed with collection by levy until the person has been given notice and the opportunity for an administrative review of the matter (in the form of a hearing with Appeals) and, if dissatisfied, with judicial review of the administrative determination. See Davis v. Commissioner, 115 T.C. 35, 37 (2000); Goza v. Commissioner, 114 T.C. 176, 179 (2000). In the case of such judicial review, the Court will review a taxpayer's liability de novo to the extent that the existence or the amount of the underlying tax liability is properly at issue. See Sego v. Commissioner, 114 T.C. 604, 609-610 (2000). A person's underlying tax liability may be at issue "if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise

have an opportunity to dispute such tax liability.” Sec. 6330(c)(2)(B). The Court will review the Commissioner’s administrative determination for abuse of discretion in all other regards. See Sego v. Commissioner, 114 T.C. at 609-610.

Because petitioner did not have a prior opportunity to dispute the section 6702 penalties assessed for 2006, 2007, 2008, and 2009, petitioner was entitled to raise the underlying liability in his CDP hearing. Lindberg v. Commissioner, T.C. Memo. 2010-67, and he may do so in this proceeding.

Under section 6702, a civil penalty may be assessed against a taxpayer if: (1) The taxpayer files a document that purports to be an income tax return; (2) the purported return lacks the information needed to judge the substantial correctness of the self-assessment or contains information indicating that the self-assessment is substantially incorrect; and (3) the taxpayer’s position is frivolous or demonstrates a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws. Petitioner submitted Forms 1040X for 2006, 2007, and 2008, and a Form 1040 for 2009, that contained information indicating that the self-assessment was substantially incorrect. See Blaga v. Commissioner, T.C. Memo. 2010-170. Additionally, petitioner on those Forms took the position that salary he received is not taxable income, which position has long been considered to be frivolous. See id.; Pabon v. Commissioner, T.C. Memo. 1994-476. In fact, on identical facts, the Court has held that the Commissioner correctly assessed the section 6702(a) penalty. See Lindberg v. Commissioner, T.C. Memo. 2010-67; see also secs. 1, 61(a)(1); United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981) (“Compensation for labor or services, paid in the form of wages or salary, has been universally held by the courts of this republic to be income, subject to the income tax laws currently applicable.”). Petitioner’s position here is one that the Commissioner has identified as frivolous under section 6702(c). See sec. 6702(a); Notice 2007-30, 2007-1 C.B. 883 (listing and specifying among various frivolous positions, a position that wages, tips, and other compensation received for the performance of personal services are not taxable income). Insofar as petitioner might try to twist Eisner v. Macomber, *supra*, away from its narrow holding that a shareholder-taxpayer did not realize gain on the receipt of a stock dividend, the Supreme Court has made clear that gross income includes all accessions to wealth and that the Eisner v. Macomber definition of income “was not meant to provide a touchstone to all future gross income questions.” Commissioner v. Glenshaw Glass Co. v. Commissioner, 348 U.S. 426, 431 (1955).

Petitioner has failed to make a valid challenge to the appropriateness of respondent's intended collection action or offer alternative means of collection. These issues are now deemed conceded. Rule 331(b)(4). In the absence of a valid issue for review, the Court concludes that respondent is entitled to judgment as a matter of law sustaining the notice of determination upon which this case is based.

Respondent also moves for imposition of a penalty on petitioner pursuant to section 6673(a)(1). Such section authorizes the Tax Court to require a taxpayer to pay to the United States a penalty not in excess of \$25,000 whenever it appears that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceedings is frivolous or groundless.

Petitioner is no stranger to this Court. In an Order issued on June 20, 2012, in petitioner's prior case at docket No. 6492-12, petitioner was warned that continued advancement of positions suggested by certain matters stricken by the Court in his amended petition in that case could result in a penalty under section 6673. Those stricken matters included his claim that compensation paid to him was not taxable income and that no taxable wages were received.

In the present case the Court is satisfied that petitioner instituted or maintained the action primarily for delay and that his position regarding the alleged nontaxable status of his compensation is frivolous and groundless. Accordingly, a penalty of \$3,000 shall be imposed on petitioner pursuant to section 6673(a).

Upon due consideration and for cause, it is

ORDERED that respondent's Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted And To Impose A Penalty Under I.R.C. Section 6673, filed June 5, 2013, is recharacterized as respondent's Motion For Summary Judgment And To Impose A Penalty Under I.R.C. Section 6673. It is further

ORDERED that respondent's Supplement To Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted And To Impose A Penalty Under I.R.C. Section 6673, filed July 19, 2013, is recharacterized as respondent's Supplement To Motion For Summary Judgment And To Impose A Penalty Under I.R.C. Section 6673. It is further

ORDERED that petitioner's Objection To Respondent's Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted And To Impose A Penalty Under I.R.C. Section 6673, As Supplemented, filed July 29, 2013, is recharacterized as petitioner's Objection To Respondent's Motion For Summary Judgment And To Impose A Penalty Under I.R.C. Section 6673, As Supplemented. It is further

ORDERED that respondent's aforementioned motion filed June 5, 2013, and supplemented July 19, 2013, as recharacterized as a motion for summary judgment and to impose a penalty under I.R.C. section 6673, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the proposed collection action (levy) in respect of petitioner's outstanding section 6702 penalty liabilities for the taxable years 2006, 2007, 2008, and 2009, as determined in the Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated March 29, 2013, upon which notice this case is based. It is further

ORDERED AND DECIDED that petitioner shall pay a penalty to the United States pursuant to section 6673(a) in the amount of \$3,000.

**(Signed) Robert N. Armen, Jr.**  
**Special Trial Judge**

Entered: **AUG 01 2013**